SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1120

RICHARD SCHULMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Statement of Facts	3
Reason for Granting the Writ	10
I. The Circuit Court misapplied the harmless error standard of *Fahy* v. *Connecticut* and *Chapman* v. *California*, where the erroneous admission of hearsay testimony in a conspiracy case alone served to implicate the petitioner at the very beginning of the conspiracy, thus showing a degree of knowledge and participation and a stake in the venture not otherwise demonstrated by admissible evidence	10
Conclusion	14
Appendix—Opinion of the United States Court of Appeals	15

TABLE OF AUTHORITIES

Cases:

Chapman v. California, 386 U.S. 18	10, 13
Fahy v. Connecticut, 375 U.S. 85	10, 13
Kotteakos v. United States, 328 U.S. 750	14
Krulewitch v. United States, 336 U.S. 440	14

PAGE

Lutwak v. United States, 344 U.S. 604 (1953) 11

Nye & Nissen v. United States, 336 U.S. 613 (1949) 10

United States v. Accardi, 342 F.2d 697 (2d Cir. 1965) 11
United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962) 10
United States v. Peoni, 100 F.2d 401 (2d Cir. 1945) 10

Statutes:

18 U.S.C. Section 891 2
Section 894 2

28 U.S.C. Section 1254(1) 2

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Richard Schulman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 2, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to this brief. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 2, 1972. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under U.S.C. Section 1254 (1).

Question Presented

Did the Circuit Court misapply the harmless error standard of *Fahy* v. *Connecticut* and *Chapman* v. *California*, where it held harmless the admission of hearsay testimony which alone served to implicate the petitioner at the very beginning of the conspiracy, thus showing a degree of knowledge and participation and a stake in the venture not otherwise demonstrated by admissible evidence.

Statement of the Case

Indictment 70 Cr. 1119 charged the petitioner Schulman, along with Paul "Sonny" Cafaro, Gulio Alfred Mainetti and Jack J. Virga with one count of conspiracy to use extortionate means to collect an extension of credit, and two counts of using extortionate means to collect an extension of credit (Title 18 U.S.C. Sections 891, 894, 2).

Schulman, Cafaro and Mainetti were tried together, defendant Virga having died. After the close of the government's proof, the case against Mainetti was dismissed by the court (T. 422).*

* References preceded by the letter "T" are to the pages of the trial transcript.

Schulman and Cafaro were convicted on all three counts, in the United States District Court for the Southern District of New York on August 17, 1971, after a trial before Hon. Dudley B. Bonsal and a jury. The petitioner Schulman was sentenced to jail for seven years on each count, the sentences to run concurrently with each other, but consecutively to a term of imprisonment previously imposed and presently being served for another conviction. Schulman was also fined $10,000 to cover the three counts.

The conviction was affirmed by the United States Court of Appeals for the Second Circuit.

Statement of the Facts

Lawrence Fitzgerald testified that he is a tile contractor and owns, along with his brother, the Fitzgerald Tile Company of Poughkeepsie, New York (T. 15-16). He knew the defendant Mainetti for three years, Mainetti being a contractor and also the owner of a restaurant, Barnaby's Loaf and Tankard, in New Paltz, New York. Fitzgerald and Mainetti were associated with each other as gambling partners (T. 17, 93-6). They bet with New York City bookies and frequently Mainetti would lose while Fitzgerald would win. Since their bets were pooled, the two would be even with the bookies, the total of sums won and lost canceling out, but Mainetti ended up owing Fitzgerald about $5,500 (T. 17-18, 123).

In the spring of 1970 Mainetti introduced Fitzgerald to two New York bookies, Leo and Huey. Mainetti told Leo that Fitzgerald had been betting through him (Mainetti)

and wanted Fitzgerald to have a line of credit so that Fitzgerald could bet directly (T. 21). A week later, Leo gave Fitzgerald credit up to $5,000, but added that Mainetti would have to guarantee any losses Fitzgerald sustained. "They would look to Art [Mainetti] for the payment" (T. 22). Within the next week Fitzgerald lost $5,400 betting with Leo on baseball games (T. 22-3).

In June, 1970, Fitzgerald saw Mainetti in New Paltz and told him of his losses, and asked Mainetti to make the payment to the bookies. "Then we'd be even" on our debt (T. 23-4). Mainetti however complained that he had also lost about $5,500 and owed the New York bookies approximately $11,000. He also was heavily in debt to the Kingston and Poughkeepsie bookies, making a grand total of about $20,000 owed (T. 23-4). Fitzgerald suggested that he would cosign a note with a bank to raise the money needed. Alternatively, Fitzgerald suggested that they enlist the aid of a friend, Joseph Cafaro (the brother of the defendant Paul Cafaro) who, some five years before, had helped Fitzgerald settle another gambling debt (T. 24-5). Mainetti wanted to try the second line of approach and the two met with Joseph Cafaro who agreed to "look for a settlement" (T. 25-6). This attempt, however, did not meet with success (26). Some time later, Mainetti and Fitzgerald met again, and Mainetti announced that a settlement had been reached. It had cost him three or four thousand dollars to "get out of the New York debt" and obtain an extension of time to pay the Kingston and Poughkeepsie bookies (T. 31). Mainetti added that "the fellow who interceded for him in the settlement of his debts at the bookmakers was a Jewish shylock fellow" named Richie (T. 28).

On November 24, 1970 (Fitzgerald in the interim having received no communication from Leo or anyone else about his debt [T. 31]), Mainetti came to see Fitzgerald and told him that the New York bookies "did not want to forget the $5,500 debt" (T. 32). Fitzgerald replied that he did not owe the money, Mainetti did, but Mainetti answered that he did not have the money and it might be made known by the Kingston bookies that Fitzgerald had just won $8,000 to $10,000 from a Kingston bookmaker (T. 32, 115-17). Fitzgerald admitted having won $25,000 (T. 115-16). Mainetti added that "the people" in New Paltz, "Sonny and Richie," already knew about it (T. 33). Mainetti also told him that he could expect a call or visit within the week, but Fitzgerald maintained that he did not owe any money. As a result of this conversation, Fitzgerald went to the F.B.I. in Poughkeepsie (T. 33, 170).

The next day, November 25, the defendant Sonny Cafaro called, and Fitzgerald met him in Fitzgerald's car. The witness' car was followed by a green Mercury (T. 34) which in turn was followed by the F.B.I. (T. 149-50). Cafaro told Fitzgerald that he owed $5,000 to the New York bookies and would have to pay. Fitzgerald answered that Mainetti owed the money and offered to cosign a note with Mainetti. Cafaro replied that he did not want a note with Mainetti and that Fitzgerald owed the money. Cafaro concluded that "I guess we can't negotiate any further" (T. 35). When the two parted, Cafaro entered the green Mercury and drove away (T. 152).

Two days later, Fitzgerald met Mainetti again and tried to explore ways of raising money. Mainetti warned that

the New York bookies were thinking of adding a "vig" or interest for non-payment onto the debt, bringing the sum to $8,600 (T. 37-8).

On December 1, F.B.I. surveillance saw Sonny Cafaro meet his brother Joseph in a restaurant. They were joined by a third person, Jack Virga, and Sonny Cafaro and Virga left in a gray Lincoln Continental Mark III with New Jersey license plate number PLJ412. The car was followed, but lost, and later spotted in front of Fitzgerald's office (T. 173-6). When Cafaro came to Fitzgerald's office, he asked to talk the situation over. Fitzgerald entered the gray Lincoln, and as they drove Virga yelled and screamed at Fitzgerald, saying "This is the mob. We have to get paid." Virga perfunctorily rejected Fitzgerald's answer that Mainetti owed the money, and asked how much Fitzgerald could "get up." Fitzgerald said about $1,500 or $2,000, and then $2,000, and then broke down and cried. Cafaro suggested that he would save Fitzgerald from paying the "vig", and when Fitzgerald acceded to paying Virga became "very friendly". He explained that the reason Fitzgerald has this problem is that several years ago he "screwed" another bookmaker, and "you are not going to do it again" (T. 40-3). Fitzgerald, four years before, had owed $30,000 to a New York bookie (T. 100). Fitzgerald was then driven to his bank where he signed a note for $2,000 and gave the money to Virga (T. 44, 216-17). Virga told Cafaro that Cafaro would be responsible for the rest of the money, Virga stating that "I am not coming up here anymore. There will be no more visits" (T. 44). Virga also said that Fitzgerald was "too nice a guy to be stuck by Mainetti" and that he would go over

and "shake up" Mainetti (T. 120). Later in the day Fitzgerald called F.B.I. agent Eisele. On the phone Fitzgerald told Eisele that he "just had a visit" from Cafaro and someone named "Jackie", and described Virga as "an enforcer" (T. 153-4).

On December 7, Mainetti called Fitzgerald and stated that New York was not going to accept a settlement and Fitzgerald had better "come up with the money" (T. 50). Cafaro then called and told Fitzgerald to pay the money to Mainetti, but the witness replied that he would not (T. 51). Fitzgerald then met again with Mainetti, and Mainetti told him "I wish you would go to the law and get the pressure off me" (T. 103). Mainetti mused that "I made my bed, now I got to sleep on it," explaining that "Richie had him in three businesses" (T. 52-3). Fitzgerald again suggested cosigning a note, but Mainetti answered "they told me to tell you it's the bottom of the ninth. Either get up the money or don't is what it means" (T. 54-5). Mainetti added that Fitzgerald could expect a phone call (T. 55).

The next day, December 8, Fitzgerald received a phone call at his place of business. Agent Eisele listened on an extension (T. 57, 61, 84, 89, 172, 130, 137, 157-9). Eisele made notes during the conversation, and listed the time of the call in his report and a letter as 10:50 A.M. However, Eisele said that 10:50 A.M. was a mistake, the time should have been 11:50, and he had made a correction in his notes (T. 355-62). The caller, an unidentified voice, called Fitzgerald by name, and stated "I'm the boss. I sent this fellow up to see you to make payment and you haven't been making good your promise. Do you want another visit?" Fitzgerald replied "yes," and the caller

said "I'll have a fellow there tomorrow * * * at your shop" (T. 57, 159).

The next day, December 9, Mainetti called again and said that "they still didn't want to forget the debt, that I had to pay him." Fitzgerald said he was not going to pay, and Cafaro came on the phone and asked "What's this * * * about not paying?" Fitzgerald told him that "I'm not going to pay you either, Sonny. I'm going to pay the fellow that I owe the money to, either Jackie or the New York book" (T. 59, 178-9). Shortly thereafter, Cafaro drove up in the green Mercury. Schulman was in the passenger's seat. Mainetti simultaneously drove up in his car. Fitzgerald walked across the street to the bank and obtained $3,400 against a note he signed. After leaving the bank, Cafaro told Fitzgerald, "You pay Art," and Fitzgerald gave the money to Mainetti (T. 59-61, 161-2, 220-1, 240-1).

Besides the testimony of Fitzgerald, the government brought out that during the summer of 1970 a cook in Mainetti's restaurant saw Cafaro and Schulman there, and on December 1 Schulman again appeared at the restaurant with Cafaro (T. 375-8). The cook identified a photograph of Virga as Schulman (T. 378-9).

F.B.I. agent Kent testified that on December 9 he saw the gray Lincoln with New Jersey plates PLJ412 on the New York Thruway being driven by Schulman. Later he saw the Lincoln in Cafaro's driveway (T. 193-5).

George Heintz, the president of a contracting firm in Mamaroneck, testified that he had rented the gray Lin-

coln for use by employees and friends of his firm. He knew Schulman for seven years. Any one of fifteen to twenty salesmen or friends could borrow the car, one of them being Cafaro who formerly was a salesman for his company. During the fall of 1970 Schulman borrowed the car, although during this period Heintz reclaimed the gray Lincoln and let Schulman use one of two other cars. Schulman, at the time, was awaiting receipt of a new car he had bought or was having his old car serviced (T. 223-38).

When Virga was arrested on December 15, a piece of paper in his wallet had Schulman's name, address and phone number. The other side of the paper had the name Joanne written on it (T. 187-9, 396-8).

Finally, the government introduced telephone records showing a call on November 30 from Mainetti's restaurant to Schulman's home phone (T. 268-70); on December 8 a call from Cafaro's business address to Schulman's home (T. 278-9); and on December 8 a call from Schulman's home at 11:42 A.M. to Fitzgerald's business office (T. 279-81).

Reason for Granting the Writ

I. The Circuit Court misapplied the harmless error standard of *Fahy* v. *Connecticut* and *Chapman* v. *California* where the erroneous admission of hearsay testimony in a conspiracy case alone served to implicate the petitioner at the very beginning of the conspiracy, thus showing a degree of knowledge and participation and a stake in the venture not otherwise demonstrated by admissible evidence.

The evidence connecting Schulman with the conspiracy and substantive counts was meager at best. The only appearance made by the petitioner occurred on December 9, when he rode as a passenger in the car driven to Fitzgerald's office by Cafaro. Schulman's mere appearance, of course, even assuming he had some knowledge that a crime was being committed, is insufficient to support a conviction. *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Other proof regarding Schulman's acquaintance with Mainetti and Virga was hardly inculpatory. The only bit of evidence carrying any weight at all concerns the phone call of December 8. Fitzgerald, it will be remembered, received a call from a person whose voice he could not identify who stated that "I'm the boss," and made reference to having sent someone to see him about paying his gambling debt. The call was recorded by the agent listening in as having taken place at 11:50 A.M. Phone records listed a call from Schulman's residence to Fitzgerald's office at 11:42 A.M. While this discrepancy is meaningful, more important is the fact that the caller was unidentified. For, the fact that the

call was placed from Schulmans home, of course, does not prove that Schulman made it. The caller could have easily been Virga or Cafaro, both of whom, according to the government, knew Schulman, and either one of whom could simply have disguised his voice to further intimidate Fitzgerald by evoking the specter of "the boss."

In such a posture, extreme care must be taken at trial to make sure that the jury does not consider hearsay or prejudicial proof when reaching its verdict. Yet in the present case, not only were portions of the evidence hearsay, but some of it was directly inflammatory and prejudicial, especially to the detriment of Schulman. Primarily, much of the evidence presented was conversations between Fitzgerald and Mainetti, the gambling partners. Mainetti in many instances conveyed to Fitzgerald the intentions and not very veiled threats of the bookmakers in New York or Kingston. Certainly, if Mainetti were a part of the conspiracy, these conversations would be relevant against him, and, under the familiar rule allowing declarations of co-conspirators to be used against his fellow plotters, they could be received against others subsequently connected to the conspiracy [*e.g.*, *Lutwak* v. *United States*, 344 U.S. 604 (1953); *United States* v. *Accardi*, 342 F.2d 697 (2d Cir. 1965)]. Significantly, however, the claim by Mainetti that he, like Fitzgerald, was a victim, was sustained by the trial court, Mainetti's motion to dismiss being granted at the close of the government's case (T. 422). The trial judge felt that Fitzgerald and Mainetti were "comrades in misery" (T. 446). Clearly, then, Mainetti not being a conspirator, his declarations do not come within the exception to the hearsay rule regarding declarations of a co-conspira-

tor. Thus, Mainetti's declarations lost any claim to admissibility at the trial and could not be considered by a jury in any manner.

The Second Circuit held that while Mainetti may not have been criminally culpable, he was nevertheless involved in the conspiracy at least as a "well informed agent of the conspirators,' and thus some of the statements made to Fitzgerald were admissible because they were made during the course and in furtherance of the conspiracy. Nonetheless, the Court of Appeals held that one of the statements "may have been improperly admitted * * * as there was little evidence indicating that this statement was made in furtherance of the conspiracy, or, indeed, that Mainetti had yet become a party to it." The statement referred to occurred in June 1970, six months before Fitzgerald was approached to pay the debt. In June Mainetti had revealed to Fitzgerald that the debt had been settled. "The fellow who interceded for him in the settlement of his debts at the bookmakers was a Jewish shylock fellow" named Richie (T. 28). The name "Richie," moreover, was not unexplained, for had the jurors somehow failed to guess that Richie meant the petitioner Richard Schulman, they could simply recall that the prosecutor in his opening address had told them that the debt was originally "straightened out through the services of a Richie, who later turns out to be the defendant, Richard Schulman" (T. 4). Thus, without any claim of admissibility, Mainetti having had his case dismissed, the characterization of Schulman as someone who could successfully intercede with big time bookies, and as a "Jewish shylock" went to the jury. And, far from being harmless, the statement severely damaged the petitioner in the context of the case.

In *Fahy* v. *Connecticut*, 375 U.S. 85, this Court stated the preferred approach to the harmless error rule:

> "The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction" (375 U.S. at 86-7; to the same effect: *Chapman* v. *California*, 386 U.S. 18, 23).

The Second Circuit holding that the admission of the June statement was harmless is not in accord with the realities of the case. For Schulman's only appearance on the scene came toward the end of the enterprise. The jury had to decide, however, the extent of his participation, in order to find him guilty as a conspirator. Among the questions presented, then, were the degree of Schulman's knowledge, and what stake, if any, he had in the venture. Clearly, if Schulman's activity, rather than being confined to the end of the venture, is brought forward to the beginning, his implication is magnified enormously. Any inevitable doubts about his stake or degree of knowledge and participation would quickly be resolved by the revelation that he was active from the earliest times. Moreover, there could be little doubt after this that the telephone call from the unidentified voice saying "I'm the boss" would unhesitatingly be attributed to Schulman by the jury, his role as *eminence grise* already being firmly fixed in their minds through Mainetti's inadmissible declaration.

Consequently, with Mainetti's exoneration as a conspirator attendent upon the granting of his motion by the court, there is no rationale that can justify his out-of-court statement to Fitzgerald being considered by the jury. And since this hearsay declaration was highly inflammatory and prej-

udicial to Schulman, the evidence against him being extremely weak, Schulman is entitled to a new trial, free of harmful, extraneous testimony. *Krulewitch* v. *United States,* 336 U.S. 440; *Kotteakos* v. *United States,* 328 U.S. 750.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 393, 402—September Term, 1971.

(Argued January 5, 1972 Decided February 2, 1972.)

DOCKET NOS. 71-1922, 71-1950

UNITED STATES OF AMERICA,

Appellee,

—against—

PAUL L. CAFARO and RICHARD SCHULMAN,

Defendants-Appellants.

Before:

FRIENDLY, *Chief Judge,*
MOORE *and* OAKES, *Circuit Judges.*

Appeals from judgments convicting appellants of having conspired to use extortionate means to collect and to attempt to collect extensions of credit and to punish the non-repayment of extensions of credit in violation of 18 U.S.C. §§891, 894 and of having committed the substantive offenses on two occasions, entered after a jury trial before Dudley B. Bonsal, *Judge,* in the United States District Court for the Southern District of New York and from an order denying Cafaro's motion for judgment of acquittal or a new trial.

Judgments of convictions and order affirmed.

CHARLES A. STILLMAN, New York, N. Y. (Botein, Hays, Sklar & Herzberg, New York, N. Y., on the brief), *for Appellant Cafaro.*

ALAN SCRIBNER, New York, N. Y. (Albert Krieger, New York, N. Y., on the brief, Ivan S. Fisher, New York, N. Y., of counsel), *for Appellant Schulman.*

MAURICE M. MCDERMOTT, Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., and Rudolph W. Giuliani, Assistant United States Attorney, New York, N. Y., of counsel), *for Appellee.*

MOORE, *Circuit Judge*:

Richard Schulman and Paul L. Cafaro appeal from judgments of conviction entered after a six day jury trial in thet Southern District of New oYrk. Appellants and two others, Alfred Mainetti and Jack J. Virga, were charged with having conspired to use extortionate means to collect, and to attempt to collect, extensions of credit and to punish persons for the nonrepayment of extensions of credit in violation of 18 U.S.C. §§891, 894 and with having committed the substantive offenses on two occasions. Defendants Schulman, Cafaro and Mainetti were tried together, Virga having died before trial. At the close of the Government's case, the charges against Mainetti were dismissed. The jury returned verdicts of guilty on all three counts as to both Schulman and Cafaro.

On this appeal, appellants contend that they were denied a fair trial because certain allegedly prejudicial hearsay declarations were improperly admitted. Cafaro also contends that the evidence was insufficient to support his conviction. As answers to both contentions rest on an evaluation of the evidence independent of the hearsay declara-

tions, a somewhat detailed description of this evidence is required.

The Facts

The victim of the extortionate scheme was Lawrence Fitzgerald, part owner of the Fitzgerald Tile Company in Poughkeepsie, New York, and a heavy gambler. During the spring of 1970, he and the defendant Mainetti, also a heavy gambler, would pool their bets and place them with bookmakers in New York City and upstate New York. As a result of this arrangement, Mainetti came to owe Fitzgerald approximately $5,500. Subseqeutnly, Mainetti introduced Fitzgerald to bookmakers in New York City who agreed to accept up to $5,000 in bets directly from Fitzgerald approximately $5,500. Subsequently, Mainetti intro- Fitzgerald's losses. Shortly after this agreement was reached, Fitzgerald sustained over $5,000 in gambling losses. When he approached Mainetti asking him to cover the losses, Mainetti informed him that he was indebted to various bookmakers for approximately $20,000 and that he was unable to pay any of the money he owed. Some time after this conversation, Mainetti was able to settle some of his debts. However, neither he nor Fitzgerald did anything to satisfy Fitzgerald's debt to the New York City bookmakers.

For five months, until November, 1970, no one communicated with Fitzgerald about his debt. Then, on November 24, Mainetti advised Fitzgerald that the bookmakers were not going to forget the debt and that he should prepare himself for a call from someone interested in settling the debt. This conversation spurred Fitzgerald into telephoning the F.B.I. in Poughkeepsie.

On November 25, Cafaro telephoned Fitzgerald and arranged a meeting to discuss the debt. When they met, Fitzgerald, in response to Cafaro's declaration that he was going to have to pay, protested that Mainetti owed the money. Cafaro remained firm in his position. Finally, Fitzgerald agreed to make some arrangements for the payment of the debt but asked that he not be subjected to any "strongarm people" during future negotiations. Cafaro said there was a good possibility the request could be granted.

Two days later, Fitzgerald spoke with Mainetti to determine what arrangements could be made to settle the debt. No answer was forthcoming. During this conversation Fitzgerald was informed that the "New York people" were thinking of adding an interest charge onto his debt. Had this charge proved necessary, the debt would have risen to $8,600.

On December 1, Cafaro arrived at Fitzgerald's place of business driving a Lincoln Continental Mark III. The Government established that this car had been borrowed by Richard Schulman from a friend for his personal use. The appellant Schulman, however, was not then in Cafaro's company.

After the car was parked, Cafaro approached Fitzgerald and asked him to enter the car in order to discuss the debt. Fitzgerald complied with the request. On Cafaro's instructions, Fitzgerald sat on the rear seat of the car while Cafaro seated himself in the driver's seat. The defendant Virga was sitting next to Cafaro. Then, while Cafaro drove, Virga threatened Fitzgerald stating "This is the mob. We have to get paid." (Tr. p. 41)[1] Fitzgerald was ultimately

1. "Tr." refers to the trial transcript.

reduced to tears. After Cafaro promised to help eliminate any interest charge, Fitzgerald agreed to stop stalling and to pay the debt. Part of the debt was then paid. Later, as Virga was leaving, Virga told Cafaro that he was responsible for collecting the remaining part of the debt which was to be paid in five or six days.

A week later, on the 7th of December, Mainetti telephoned Fitzgerald and asked him to pay the balance of the debt to him. Fitzgerald responded that he would only pay a representative from New York City. Then Cafaro telephoned and also asked Fitzgerald to hand the money over to Mainetti. Again Fitzgerald refused. Later in the day, Fitzgerald met Mainetti and was informed that "They said to tell you it's the bottom of the ninth." (Tr. p. 55).[2]

The following day Fitzgerald received a telephone call from someone who identified himself as "the boss." Fitzgerald and "the boss" arranged for someone to meet Fitzgerald the following day to discuss payment of the debt. Telephone company documents established that this call was placed from Schulman's residence.

On December 9, at approximately 1:20 P.M., Schulman was observed by an F.B.I. agent driving his Lincoln Continental near Cafaro's residence. The car was later seen parked in Cafaro's driveway. At approximately 2 P.M., Fitzgerald received a telephone call from Mainetti who advised Fitzgerald to pay the money to him. Fitzgerald refused. Then Cafaro got on the phone, informed Fitzgerald that he was with "the man" and told him that "we'll be over in a few minutes." (Tr. p. 59). Shortly thereafter, Cafaro, driving his own car with Schulman as his sole

2. Among baseball fans, such as Fitzgerald, this phrase would be understood as an implied threat; the conspirators were tiring of the "game" Fitzgerald was playing in refusing to pay Mainetti.

passenger, arrived at Fitzgerald's tile company. They were followed by Mainetti who had driven another car. Cafaro then directed Fitzgerald to pay Mainetti. Fitzgerald complied. Subsequently, the four named defendants were arrested.

The Hearsay Declarations With Respect To Schulman

Appellant Schulman contends that all the out-of-court declarations attributed to Mainetti were improperly admitted.[3] In particular, his argument rests on the purported prejudice flowing from three of these declarations. His theory is that since the charges against Mainetti were dismissed, the latter's declarations could no longer come within the exception to the hearsay rule regarding co-conspirators. We disagree.

The determination of whether hearsay declarations are admissible under the "co-conspirator" exception to the hearsay rule does not rest on finding sufficient evidence to submit a charge of conspiracy to the jury with respect to either the declarant or the defendant against whom the declarations are offered.[4] Rather, the threshold question is whether the Trial Judge could conclude, after all the evidence is in, that the prosecution had established the declarant's and the defendant's participation in the conspiracy "by a fair preponderance of the evidence independent of the hearsay utterances." *Geaney, supra,* at 1120. Applying this standard to the above facts, we conclude that

3. In its brief the Government asserted that defense counsel failed to make proper objections to the admission of the hearsay declarations. A review of the transcript proves this claim to be without merit. (Tr. pp. 415, 444)

4. *United States* v. *Geaney,* 417 F.2d 1116, 1119-1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970), and cases cited therein.

the Trial Judge was correct in answering this initial question affirmatively.

The Trial Judge ultimately dismissed the charges against Mainetti after concluding that it was "pretty speculative as to whether he [Mainetti] was involved in this or whether he was a victim with Fitzgerald." (Tr. p. 422). While this conclusion apparently served to absolve Mainetti of criminal culpability, it cannot obscure the fact of Mainetti's extensive participation in the conspiracy. There can be no doubt as to Mainetti's standing as a well informed agent of the conspirators. With one possible exception, discussed below, the evidence was more than sufficient to support the Trial Judge's reliance upon the "co-conspirator" exception to the hearsay rule. *Cf., United States* v. *Lev,* 276 F.2d 605, 608 (2d Cir.); *cert. denied,* 363 U.S. 812 (1960); *United States* v. *Miller,* 246 F.2d 486, 490 (2d Cir.), *cert. denied,* 355 U.S. 905 (1957); *United States* v. *Olweiss,* 138 F.2d 798 (2d Cir. 1944).

Having found sufficient evidence of Mainetti's participation in the conspiracy, we must determine whether his declarations were made in furtherance of the conspiracy. With respect to this issue, we find that two and possibly all three of the three contested declarations were properly admitted. The first of these was made on November 24 during the conversation in which Mainetti advised Fitzgerald that his debt had not been forgotten. According to Fitzgerald Mainetti stated that "the Kingston bookmaker had made a statement that I won eight to ten thousand dollars through him and that * * * the people in New Paltz knew about it"—the people in New Paltz being—"Sonny

and Richie." (Tr. pp. 32-33).[5] As the appellants contend, there is no doubt that the jury properly inferred that "Richie" was the defendant Richard Schulman and "Sonny" the defendant Paul Cafaro. However, it is similarly indisputable that the statement was in furtherance of the conspiracy; Fitzgerald was on notice that protestations of poverty would be of little avail when he was asked to pay the debt. The second statement which was properly admitted was made on December 7, at which time Mainetti was attempting to convince Fitzgerald to settle the debt by merely handing him the money. During this conversation, Mainetti explained his own fear of the conspirators; it was because "Richie had him in three businesses." (Tr. p. 52).[6] As this statement made the power of the conspirators evident, it was also made in furtherance of the conspiracy.

The sole statement which may have been improperly admitted appeared in Fitzgerald's testimony on the first day of the trial. Mainetti apparently told Fitzgerald in

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5. The Government could have argued for the admission of this declaration on the theory that it was a "verbal act" and not hearsay at all. As a "verbal act" the declaration could have been offered as circumstantially probative of an implied threat but not as proof of anything asserted in the utterance. As such it might have been admissible against Mainetti and all other defendants whose participation in the conspiracy was established by independent evidence. *Cf., Lutwak* v. *United States*, 344 U.S. 604, 617-619 (1953); *United States* v. *Bennett*, 409 F.2d 888, 895 n. 6 (2d Cir.), *cert. denied sub nom. Haywood* v. *United States* and *Jessup* v. *United States*, 396 U.S. 852 (1969); *United States* v. *Costello*, 352 F.2d 848, 853-855 (2d Cir. 1965), *rev'd on other grounds*, 390 U.S. 89 (1968). However, as the declaration was clearly admissible as evidence of the truth of the matter asserted, enabling the jury to draw all reasonable inferences therefrom, we need not determine whether the declaration would have also been admissible on the alternative ground.

6. Cf., fn. 5.

June that "a Jewish shylock fellow" named "Richie" had helped him settle some of his debts with various bookmakers. (Tr. p. 28). As there was little evidence indicating that this statement was made in furtherance of the conspiracy, or, indeed, that Mainetti had yet become a party to it, we must determine whether its admission was prejudicial.

After a careful evaluation of the evidence we find that the admission of the statement, which was not referred to in any later testimony and was not mentioned in the prosecutor's summation, was harmless error. At most, the jury might have considered the statement as a slight addition to their information about the "Richie" who had Mainetti in three businesses and the "Richie" who was sufficiently well situated to be informed by the bookmakers of Fitzgerald's winnings. The significance of the statement is further diminished when considered in light of the other evidence and all the reasonable inferences therefrom. Thus, shortly after Cafaro spoke with Fitzgerald by telephone and announced that he was with "the man" and stated that "we'll be over in a few minutes," Schulman was present as the sole passenger in a car from which Cafaro directed Fitzgerald to pay Mainetti. Next there was the telephone call from Schulman's residence in which "the boss" discussed arrangements for the payment of the debt. Finally, there is the use of Schulman's Lincoln Continental by Virga and Cafaro to aid in the attempt to intimidate Fitzgerald. As the possible error was harmless, Schulman's judgment of conviction is affirmed.

Cafaro's Contentions

Cafaro also claims that he was prejudiced by the admission of certain hearsay declarations. As he has failed to point to any such declarations and as we have discovered none, the contention can be dismissed as being without merit. Similarly without merit is his claim that there was insufficient evidence to support his conviction as to all three counts. He was present at every stage of the conspiracy and was one of its more active participants. His judgment of conviction and the order denying his motion for acquittal or a new trial are affirmed.